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No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

E & T REALTY, *et al.*,
Petitioners,

v.

EDWIN STRICKLAND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is there a materially different equal protection standard applicable to unequal application of facially neutral legislation than to other equal protection claims?

2. Is there an equal protection violation only where the defendants' conduct is based "on an unjustifiable group-based standard"?

3. Did the District Court err by finding that County officials violated Petitioner's rights to equal protection of the laws by arbitrarily and irrationally applying a sewer moratorium so as to deny Petitioners the right merely to move plumbing fixtures to accommodate a medical clinic while allowing the same clinic to be served by the same sewerage system in a newly constructed building?

4. Does the clearly erroneous standard of review apply to findings by the trial court that Petitioners were damaged by an irrational, arbitrary, and capricious difference in treatment by public officials?

PARTIES

The Petitioners are the Plaintiffs-Appellees in the courts below, E & T Realty, an Alabama general partnership, and Charles D. Beard, Jr. The Respondents are the Defendants-Appellants in the courts below, Edwin A. Strickland, Richard L. Straub, Jack W. Swann, O. C. Moon, and Robert Erwin, individually and in their official capacities as members of the Jefferson County Sewer Moratorium Committee, and Charles H. Doss, Ray Moore, and David Orange, individually and in their capacities as members of the Jefferson County Commission.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CITATIONS TO OPINIONS BELOW

Review is sought from an opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 830 F.2d 1107 (11th Cir. 1987), which reversed a judgment for petitioners.[1] The opinion was issued on October 26, 1987. In pertinent part, the court: (1) held that there is a materially different standard for judging an equal protection challenge to a statute which discriminates on its face as opposed to a challenge to the unequal application of a facially neutral statute; (2) stated that the equal protection clause of the Constitution prohibits only "group-based" discrimination, and (3) did not apply the clearly erroneous rule to findings of fact as to

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[1] The opinion of the Court of Appeals is reprinted in this petition at 1a. The judgment and opinion of the District Court appears at 24a.

whether persons were similarly situated and as to whether the basis of the difference in treatment had a rational basis. Finally, the Eleventh Circuit rejected as a legal standard that "plaintiff establishes an equal protection violation by showing an arbitrary and irrational difference between the results of two particular applications of a facially neutral statute." 5a.

JURISDICTION

The opinion of the Court of Appeals was entered on October 26, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Amendment XIV, § 1 to the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves a challenge under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to the application of a sewer moratorium by officials of Jefferson County, Alabama. Those officials refused to permit Petitioners to move plumbing fixtures in an existing building, already tied into the sewer, in order to accommodate a health care clinic but permitted another entity to build a new building and tie it into the same sewer in order to accommodate the same

clinic. The only justification offered by the Respondents was that they had issued an earlier permit for the second entity, but the earlier permit had expired by its own terms long before this matter arose. The trial court found that the Petitioners and the second entity were similarly situated and that the difference in treatment between them was "irrational, arbitrary, and capricious." 30a.

Accordingly, the trial court declared that the Respondents had violated Petitioners' right to equal protection of the laws and awarded appropriate injunctive relief and damages in the amount of $161,920.00.

The Court of appeals reversed and remanded. Even though it did not say that any of the trial court's findings were clearly erroneous, the three-member panel of the Court of Appeals held, with one member dissenting, that the trial court should reconsider whether Petitioners were similarly situated to the entity allowed to build the clinic and that the trial court had to find that the Respondents had engaged in intentional discrimination. The appellate court's decision included the following language: "For plaintiffs to prevail, defendants' conduct must have been deliberately based on an unjustifiable, group-based standard." 16a.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals is in several respects inconsistent with the law established by this Court and the law in many of the other circuits. If allowed to stand, some of the language in the opinion of the Court of Appeals would severely limit the scope of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The Court of Appeals spent much of its opinion discussing the rule that an equal protection claim requires one to show intentional or purposeful discrimination, and

that a mere error or mistake does not create an equal protection violation. Petitioners agree on these points. Indeed, as discussed in the dissent, it is apparent that Respondents intended to treat Petitioners differently than the entity allowed to build the clinic and tie into the sewer. The issue, therefore, is whether there was a rational basis for the difference in treatment. The trial court found that there was no rational basis and the Court of Appeals did not state that any finding of the trial court was clearly erroneous.

However, in reversing and remanding, the Court of Appeals added some language to its opinion which might be construed as greatly limiting all equal protection claims involving differences in administrative treatment. First, the Court of Appeals stated in a footnote that a materially different equal protection standard applies to the unequal application of facially neutral legislation. Second, the Court of Appeals stated, without much discussion, that "for plaintiffs to prevail, defendants' conduct must have been deliberately based on an unjustifiable, group-based standard."

I. THERE IS DIVISION AMONG THE CIRCUITS.

In its decision, the Court of Appeals for the Eleventh Circuit departed significantly from the law of other circuits on equal protection claims.

The Fifth and Ninth Circuits have both held that equal protection requires not only that laws be equal on their face but also that they be enforced equally, without holding that some lesser standard applies. *Stern v. Tarrant County Hospital District*, 755 F.2d 430, 433 (5th Cir. 1985). *Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984).

The Seventh Circuit has held that "Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way." *Ciechon*

v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982). The Eleventh Circuit has now apparently rejected this accepted principle of law.

II. THE OPINION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE LAW OF THIS COURT.

It is apparent that the law of equal protection has changed significantly since 1944, *see generally*, Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of an Evolving Doctrine on a Changing Court; A Model for Newer Equal Protection," 86 Harv. L. Rev. 1 (1972), but even this Court's opinion in *Snowden v. Hughes*, 321 U.S. 1 (1944) is inconsistent with certain aspects of the opinion of the Court of Appeals. This Court did not establish a different standard for administrative equal protection but merely held that there must be intentional or "purposeful discrimination" which

> may appear on the face of the action taken with respect to a particular class or person, . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.

Id. at 8. Clearly, the Court did not require a "group based" standard but recognized that a difference in treatment of a "person" or an "individual" could constitute a violation of equal protection.

More recently, this Court has held:

> state action, of the kind that falls within the proscription of the Equal Protection Clause of the Fourteenth Amendment, may be brought about through the state's administrative and regulatory agencies just as through its legislature.

Robinson v. Florida, 378 U.S. 153, 156 (1964). *See also Columbus Board of Education v. Penick*, 443 U.S. 449,

475 n.5 (1979) ("the Equal Protection Clause was aimed at all official actions, not just those of state legislatures").

In addition, the Court of Appeals reversed without holding that any finding made by the trial court was clearly erroneous. This Court has held that the question of whether an employer had an intent to discriminate, in violation of Title VII of the 1964 Civil Rights Act, is one of fact, governed by the clearly erroneous standard of review on appeal. *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982). Likewise, findings on an equal protection violation should be governed by the same standard.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 86-7501

E & T REALTY, ETC., and CHARLES D. BEARD, JR., an individual,
Plaintiff-Appellee,
v.

EDWIN A. STRICKLAND, RICHARD L. STRAUB, JACK W. SWANN, O.C. MOON, and ROBERT ERWIN, individually and in their capacities as Members of the Jefferson County Sewer Moratorium Committee, and CHARLES H. DOSS, RAY MOORE, and DAVID ORANGE, individually and in their capacities as Members of the Jefferson County Commission,
Defendants-Appellants.

Oct. 26, 1987

Appeal from the United States District Court
for the Northern District of Alabama

De Martenson, Huie, Fernambucq & Stewart, Rebecca L. Shows, Birmingham, Ala., for defendants-appellants.

Joe R. Whatley, Jr., Falkenberry, Whatley & Heidt, Birmingham, Ala., for plaintiff-appellee.

Before KRAVITCH and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

This case involves allegedly discriminatory administration of facially neutral legislation. Defendants are county personnel who administer a sewer moratorium resolution. Plaintiffs are property owners. According to plaintiffs, defendants treated them unequally by denying their application for an increased sewer allocation while allowing other persons to increase their sewage.

The district court found an equal protection violation. Because the district court failed to make certain findings and applied an incorrect legal standard, we vacate and remand.

I. Factual and Procedural Background

In early 1976, Jefferson County, Alabama suffered from a severe shortage of sewerage facilities. On February 17, 1976, the Jefferson County Commission imposed by resolution a moratorium on further connections with the Patton Creek and Cahaba River sewer systems. The resolution created three exceptions to the sewer connection moratorium: (1) connections indicated on preliminary subdivision plans which had been approved prior to February 10, 1976; (2) connections for unimproved lots within existing subdivisions; and (3) connections for improved lots which had alternate sewage disposal systems. In a subsequent resolution on September 17, 1977, the Commission repealed these three exceptions.

On July 5, 1978, the Commission further amended the resolution to provide that:

> Only such connections, reconnections, expansions, and changed uses of properties connected to [the Cahaba and Patton sewage] systems (before or after the

moratorium) are or will be authorized as will not impact the sewer systems greater than the impact from such properties in the most recent former use of such properties.

The Jefferson County Commission created the Jefferson County Sewer Moratorium Committee to administer the moratorium resolution. Defendants/appellants Edwin Strickland, Richard Straub, Jack Swann, O.C. Moon, and Robert Erwin are members of the Moratorium Committee. Defendants/appellants Charles Doss, Ray Moore, and David Orange are members of the Commission.

Plaintiffs/appellees are E & T Realty, an Alabama general partnership, and Charles Beard, its managing partner. In 1980, E & T Realty purchased a three-story building called the MacMillan Building, located at 1945 Hoover Court, City of Hoover, Jefferson County, Alabama. From 1980 to 1983, the building was mostly vacant.

In the early part of the summer of 1983, Lloyd Noland Hospital offered to lease about 3000 square feet of space in the MacMillan Building for use as an outpatient clinic and to pay E & T Realty $2,200 per month for three years, commencing in July 1983. Lloyd Noland also offered to make improvements to the building in the approximate amount of $100,000.00.

E & T Realty requested permission from the Sewer Moratorium Committee to relocate existing plumbing fixtures in the MacMillan Building to provide for the water needs of its potential tenant, Lloyd Noland. In a written application filed with the Committee on August 10, 1983, E & T asked that the MacMillan Building, after relocation of the plumbing fixtures, be allowed to use 5,300 gallons per day (g.p.d.). Later, in a letter dated August 29, 1983, it requested an "unrestricted permit" to relocate the plumbing fixtures. Ultimately, at a hearing on September 16, 1983, E & T Realty requested a sewer allocation of at least 800 to 1000 g.p.d.

The Moratorium Committee took the position that the plumbing fixtures could be relocated only if, after relocation of such fixtures, the water use of the MacMillan Building would not exceed its "most recent former use." To determine "most recent former use," the Moratorium Committee used its standard method of examining water department records. These records indicated that the average daily use during the previous three years, 1980-1983, was 395 g.p.d. and during the previous sixteen years, 1967-1983, was 448 g.p.d.

The Moratorium Committee indicated that it would authorize a sewer allocation of about 448 g.p.d. But it refused to approve E & T Realty's application because E & T Realty was asking for at least twice that amount.

Without approval of its application, E & T Realty was unable to supply Lloyd Noland's water needs. Therefore, the hospital decided in September 1983 to look elsewhere. Ultimately, Lloyd Noland leased space for its clinic from a different landlord, Mitchell Joseph, in a new building several blocks away from the MacMillan Building. The Moratorium Committee had approved Joseph's sewer connection application in 1979, subject to a 5130 g.p.d. limitation.

On October 27, 1983, plaintiffs filed a lawsuit pursuant to 42 U.S.C. sec. 1983, claiming that defendants' denial of their sewerage application violated their constitutional rights to equal protection, due process, and just compensation for property taken by the government. In this complaint, plaintiffs alleged that defendants had "selectiv[ely] enforc[ed]" the sewer moratorium resolution. Plaintiffs alleged that "[w]ithout justification, defendants have allowed the additional sewage from Joseph's building." In addition, the complaint alleged that defendants had, without justification, allowed nearby restaurant owners to increase the sewage flow from their buildings.

A bench trial was conducted beginning March 18, 1985. Plaintiffs conceded at trial that they were not challenging

the sewer moratorium, itself; rather they were challenging defendants' administration of the moratorium resolution. Plaintiffs' taking and due process claims were dismissed during the trial.

On December 31, 1985, the district court entered a memorandum opinion holding that defendants violated plaintiffs' right to equal protection. The district court found:

> There has been no showing of any difference between Mitchell Joseph in 1979 and E & T Realty in 1983. The defendants have not shown any rational basis for the granting of the 5,130 gpd allocation to Mitchell Joseph and the denial of the 1,000 gpd allocation to E & T Realty. . . . The Court concludes that the difference in the defendants' treatment of E & T Realty and Mitchell Joseph is irrational, arbitrary, and capricious.

Implicitly, the court adopted the following legal standard: a plaintiff establishes an equal protection violation by showing an arbitrary and irrational difference between the results of two particular applications of a facially neutral statute.

On the same day, the district court entered an injunction, ordering defendants to grant plaintiffs a sewer allocation of at least 1000 g.p.d. and to authorize relocation of the existing plumbing fixtures in the MacMillan Building. Also, the court awarded attorney fees to plaintiffs. On June 25, 1985, the district court awarded plaintiffs damages in the amount of $161,920.00. Defendants timely appealed.[1]

II. Whether Joseph and E & T Realty Were Similarly Situated

Defendants argue that Joseph and E & T Realty were not similarly situated. Under the terms of the mora-

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[1] Plaintiffs did not cross-appeal the dismissal of their taking and due process claims.

torium resolution, defendants contend, Joseph was entitled to approval of his application but E & T Realty was not.

This argument, if correct, would eliminate plaintiffs' equal protection claim to the extent it is based on the difference in treatment between Joseph and E & T Realty. Different treatment of dissimilarly situated persons does not violate the equal protection clause.

Our review of this issue is hampered by a lack of district court findings; the district court never explicitly determined whether E & T Realty or Joseph was entitled to approval of its application. From the record, it is clear that E & T Realty was unentitled to approval of its application. Whether Joseph was entitled to approval of his, however, cannot be determined from the record on appeal.

Under the terms of the moratorium resolution, E & T Realty was not entitled to a sewer allocation in excess of the MacMillan Building's "most recent former use." The Moratorium Committee determined most recent records, a reasonable method previously approved by the Alabama Supreme Court. *Peterson v. Jefferson County*, 372 So.2d 839 (Ala.1979). These water records showed that the average water use was 395 g.p.d. during 1980 to 1983 and 448 g.p.d. during 1967 to 1983. During a period of maximum utilization of the building, 1967-1975, an average of 607 g.p.d. was used.

In this case, there is no need to determine whether the 395 g.p.d., 448 g.p.d., or 607 g.p.d. figure best represents the most recent former use. Certainly, such use was not greater than 607 g.p.d. E & T Realty requested at least 800 to 1000 g.p.d., a figure substantially in excess of the "most recent former use." Thus, defendants properly denied E & T's application.

From the record on appeal, it is impossible to determine whether Joseph was entitled to approval of his application in 1979. Apparently, Joseph's property originally fit within the subdivision plan exception to the moratorium.

In a letter dated September 7, 1977, defendants authorized Joseph's application for a sewer connection, subject to the following condition: "[t]his approval shall automatically terminate and no connection will be allowed unless substantial construction is begun in accordance with the proposed plans within 180 days of this letter." In this letter, "substantial construction" was defined as "at a minimum, the sanitary sewer construction shall have been completed and construction of 50% of the proposed buildings are above ground level." Moreover, the letter provided that "[t]his approval is limited to a maximum of 5130 gallons per day." There were three proposed buildings: a two-story bank building, a fast food restaurant, and a motel.

The district court found that "construction of 50% of these proposed buildings" was not accomplished within 180 days of the letter—that is, by February 7, 1978. Therefore, the district court found that the conditional approval of Joseph's application automatically terminated by its own terms as of mid-February 1978.

On September 27, 1977, the Jefferson County Commission amended the moratorium resolution by repealing all of the original exceptions for the moratorium, including the subdivision exception on which the September 7 approval of Joseph's application had been based. This September 27, 1977, amendment created several new exceptions, including the following:

> Also excluded from the moratorium are sewer connections for proposed construction which has received approval by the Jefferson County sewer moratorium committee prior to the date hereof but has not yet been permitted.

On July 5, 1978, the Jefferson County commission adopted another resolution regarding the moratorium. This July 5, 1978, resolution provided that:

> the Jefferson County Commission did, in accordance with the moratorium stop all new connections to the system except for the exceptions set out therein and, further, the Commission, in subsequent resolutions, has removed all such exceptions to the moratorium for connections not already permitted except where instructed by the Health Department to the contrary.[2]

On March 22, 1979, Joseph wrote to defendant Straub, informing Straub that he had constructed the bank building but not the fast food restaurant or the motel. In place of the fast food restaurant, Joseph proposed to build a "family steakhouse" restaurant. In place of the motel, Joseph proposed to build six retail stores. By letter dated April 20, 1979, the Moratorium Committee approved Joseph's application for sewer connections for these two new buildings, subject to a 5130 g.p.d. limitation.

If the conditions on the 1977 approval of Joseph's first application were effective, it appears that Joseph's second application should have been denied in 1979. At the time defendants granted Joseph's application in 1979, his property no longer fit within the preliminary subdivision plan exception to the moratorium; this exception had been repealed in 1977. Nor, if the conditions on the first approval were effective, would the property have fit within the "approved but not yet permitted" exception in 1979. The first approval would have automatically terminated in February, 1978, as a result of Joseph's failure to comply with the "substantial construction" condition.

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[2] It is undisputed that the Health Department never instructed that a sewer impact permit be issued for the building in which Lloyd Noland ultimately leased space. Also, no sewer impact permit had been issued for that building by July 5, 1978. The sewer impact permit for the building in which Lloyd Noland actually leased space was not issued until August, 1983.

We cannot determine from the record on appeal, however, whether the Moratorium Committee had power to impose the conditions on its 1977 approval. Under Alabama law

> rules and regulations and administrative action cannot subvert or enlarge upon the statutory policy or the rules or regulations therein set down. Administrative implementation cannot deviate from the principle and policy of the statute.

Alabama State Bd. of Optometry v. Busch Jewelry Co., 261 Ala. 479, 75 So.2d 121, 125 (1954); *see also Jefferson County Bd. of Educ. v. Alabama Bd. of Cosmetology*, 380 So.2d 913, 915 (Ala.Civ.App.1980).

If the conditions which the Committee purported to place on the September 7, 1977, approval were nugatory, then such approval never expired; and Joseph's property was covered by "approved but not yet permitted" exception when the Committee approved Joseph's second application in 1979. Under these circumstances, defendants' approval of Joseph's 1979 application would be proper; Joseph and E & T Realty would not be similarly situated under the terms of the moratorium resolution, and defendants' disparate treatment of them would not violate equal protection.

In the absence of any district court findings or conclusion on this issue we are reluctant to determine for the first time on appeal whether the conditions on the September 7, 1977 approval were effective. Whether an administrative action "subvert[s] or enlarge[s] upon statutory policy" is a complex question under Alabama law. *See, e.g., Shellcast Corp. v. White*, 477 So.2d 419 (Ala. Civ.App.1984), *rev'd, sub nom. Ex parte White*, 477 So.2d 422 (Ala. 1985), *on remand, Shellcast Corp. v. White*, 477 So.2d 425 (Ala.Civ.App.1985). Therefore, we remand for a determination by the district court in the first instance whether the conditions imposed by de-

fendants on their September 7, 1977 approval of Joseph's application were effective or mere surplusage.

Moreover, on remand, the district court should not assume that E & T Realty and Joseph were necessarily similarly situated even if the district court ultimately finds that both were unentitled under the terms of the moratorium resolution to approval of their applications. Of course, persons who are clearly unentitled to a permit are dissimilarly situated from persons who are clearly entitled to a permit. But also they are dissimilarly situated for purposes of the equal protection clause from persons who *might* be entitled to a permit.

A local government does not violate the equal protection clause by granting a permit to an applicant who has a nonfrivolous claim of entitlement under the pertinent legislation and by denying a permit to another applicant who is clearly unentitled to it: the two applicants are not similarly situated. Granting a permit to a person with a colorable claim is an entirely reasonable way to avoid the potential cost of litigation and an adverse judgment, as well as to ensure that no permit is unjustly denied. By granting a permit in an uncertain case, a local government is not thereby constitutionally foreclosed from denying it in a "clear" case or even in an appreciably clearer (but still somewhat unclear) case of unentitlement.

E & T Realty was clearly unentitled to approval of its application under the terms of the moratorium resolution. If the district court finds on remand that a county administrator could have reasonably concluded in 1979 that Joseph might be entitled to approval of his sewer connection,[3] then Joseph and E & T Realty would not be

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[3] Factors relevant to this determination include whether an administrator in 1979 could reasonably have believed that: (a) Joseph had a colorable claim to a vested interest protected from repeal of the preliminary subdivision plan exception; (b) Joseph had a

similarly situated for purposes of the equal protection clause. Only if both Joseph and E & T Realty were clearly unentitled to approval of their application would they be similarly situated.

III. Whether Defendants Purposefully Discriminated against Plaintiffs

A remand is necessary in this case for another reason: to prevail on a claim that defendant unequally applied a facially neutral statute, a plaintiff must show intentional discrimination. The district court made no findings regarding discriminatory intent.[4]

The district court erred in ruling that plaintiffs proved an equal protection violation merely by showing an arbitrary and irrational difference between the results of two particular applications of a facially neutral statute. Plaintiffs here are not challenging a classification created on the face of the statute; in such a case they could prevail by showing that the classification is not rationally

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nonfrivolous claim of entitlement to a sewer connection because the many amendatory and (apparently) nonamendatory resolutions adopted by the Jefferson County Commission regarding the sewer moratorium were vague, inconsistent, or ambiguous; or (c) Joseph had a colorable claim that construction had been substantially completed because he had started building a large structure.

[4] The issue of intentional discrimination has been raised by the parties throughout this litigation, both at the district court and appellate levels. Complaint, Para. 17, R1, Tab 1; Answer, Second Defense, R1, Tab 16; Statement of Principal Facts Proposed to be Proved by Plaintiffs, Para. 20, R1, Tab 41; Defendants' Response to Statement of Principal Facts Proposed to be Proved by Plaintiffs, Para. 2, R1, Tab 46; Supplemental Statement of Principal Facts Proposed to be Proved by Plaintiffs, Para. 67 (Ct. Exh. 1); Defendants' Response to Plaintiffs' Supplemental Statement of Principal Facts Proposed to be Proved by Plaintiffs, Para. 67 (Ct. Exh. 1); Defendants' Response to Plaintiffs' Verified Motion to Alter or Amend Judgment, Para. 3, R1, Tab 59; Appellants' Brief, pp. 44-45.

related to a legitimate state purpose. *See, e.g., Hooper v. Bernalilo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Rather, plaintiffs are alleging that defendants unequally applied facially neutral legislation.[5]

"The unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944); *see also, Tasby v. Estes*, 643 F.2d 1103, 1107-08 (5th Cir. Unit A April 1981)

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[5] Equal protection claims can be divided into three broad categories. *See*, J. Nowak, R. Rotunda & J. Young, Constitutional Law 600 (2d ed. 1983). The first and most common type is a claim that a statute discriminates on its face. In such a case, a plaintiff can prevail by showing that there is no rational relationship between the statutory classification and a legitimate state goal. *Hooper*, 472 U.S. at 618, 105 S.Ct. at 2866. *Dandridge*, 397 U.S. at 485-86, 90 S.Ct. at 1161-62. When the statute facially discriminates against certain groups or trenches upon certain fundamental interests, courts have required a closer connection between the statutory classification and the state purpose. *See generally Plyler v. Doe*, 457 U.S. 202, 216-18 & nn. 14-16, 102 S.Ct. 2382, 2394-95 & nn. 14-16, 72 L.Ed.2d 786 (1982) (plurality) (discussing "intermediate" and "strict" scrutiny).

The second type of equal protection claim is that neutral application of a facially neutral statute has a disparate impact. In such a case, a plaintiff must prove purposeful discrimination. *See e.g., Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

The third type of claim is that defendants are unequally administering a facially neutral statute. Plaintiffs' claim in this case falls into this third category. The equal protection standard applicable to a claim of unequal application of facially neutral legislation is materially different than that applicable to a challenge to classifications created on the face of the legislation.

(administration of student disciplinary rules and regulations);[6] *Gamza v. Aquirre*, 619 F.2d 449, 453-54 (5th Cir.1980) (misapplication of vote counting procedures). Thus, even if E & T Realty and Joseph were similarly situated, the fact that defendants treated them differently would not establish an equal protection violation absent proof that defendants acted with discriminatory intent.

Unequal administration of facially neutral legislation can result from either misapplication (i.e., departure from or distortion of the law) or selective enforcement (i.e., correct enforcement in only a fraction of cases). In either case, a showing of intentional discrimination is required. *Snowden, supra* (misapplication of Illinois election law resulting in plaintiff not being placed on primary ballot); *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir.1982) (incorrect application of prison transfer regulations); *Bauza v. Morales Carrion*, 578 F.2d 447, 451 (1st Cir.1978) (departure from published regulation governing admissions to school); *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 (1918) (assessment of one taxpayers' property at full value while generally assessing other taxpayers' properties at fraction of value); *Oyler v. Boyles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed. 446 (1961) (selective prosecution of criminal statute); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir.1978) (selective prosecution of criminal statute); *Muckway v. Craft*, 789 F.2d 517, 519-23 (7th Cir.1986) (selective enforcement of zoning law); *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 359 (6th Cir.1984) (selective enforcement of licensing requirements for freestanding surgical outpatient clinics); *Harrington v. United States*,

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

673 F.2d 7, 10-11 (1st Cir.1982) (unusually severe discipline of federal probationary employee); *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir.1980) (selective enforcement of zoning regulation); *Barton v. Malley*, 626 F.2d 151, 154-55 (10th Cir.1980) (selective enforcement of parole revocation guidelines); *United States v. Torquato*, 602 F.2d 564, 568-70 (3d Cir.) (selective enforcement of criminal statute), *cert. denied*, 444 U.S. 941, 100 S.Ct. 295, 62 L.Ed.2d 307 (1979); *Cook v. City of Price*, 566 F.2d 699 (10th Cir. 1977) (selective enforcement of zoning ordinance); *Friedlander v. Cimino*, 520 F.2d 318, 319-20 (2nd Cir. 1975) (selective enforcement of licensing requirements for physicians).[7]

The Supreme Court has required purposeful discrimination in a case of allegedly unequal application of a facially neutral statute as recently as its 1986-87 Term. In *McCleskey v. Kemp*, —— U.S. ——, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), petitioner alleged that the facially neutral Georgia death penalty law was unequally applied based on the race of the murder victim. The Supreme Court held that petitioner failed to establish that application of the death penalty statute violated the equal protection clause because he failed to prove purposeful discrimination in his case. 107 S.Ct. at 1766-69.

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[7] The cases upon which appellees rely are not on point. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), and *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982), involved challenges to classifications created on the face of a statute; they were not cases involving the administration of facially neutral legislation.

In the present case, no party fits or claims to fit any suspect or quasi-suspect classification such as race, gender, or alienage. *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. Unit B March 1981), involved the reversal of a summary judgment for defendants where a black plaintiff complained of being treated differently from similarly situated white persons in respect to the enforcement of certain legislation.

Mere error or mistake in judgment when applying a facially neutral statute does not violate the equal protection clause. There must be intentional discrimination. *Snowden*, 321 U.S. at 8, 64 S.Ct. at 401; *Sunday Lake Iron Co.*, 274 U.S. at 353, 38 S.Ct. at 495; *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir.1982); *Gamza*, 619 F.2d at 453-54. Even arbitrary administration of a statute, without purposeful discrimination, does not violate the equal protection clause. *Shango*, 681 F.2d at 1104; *Jurek v. Estelle*, 593 F.2d 672, 685 n. 26 (5th Cir.1979) (where plaintiff alleges "arbitrary and capricious" administration of statute, plaintiff still must prove intentional discrimination), *issue vacated without being addressed*, 623 F.2d 929, 931 (5th Cir.1980) (en banc), *cert. denied*, 450 U.S. 1014, 101 S.Ct. 1724, 68 L.Ed.2d 214 (1981).

The district court's legal standard in this case is incorrect because it does not require intentional discrimination. The problem with the district court's standard is that *any* departure from state law would give rise to a constitutional claim. Under the district court's standard, if local government decisionmakers correctly applied a facially neutral resolution in hundreds of cases and erroneously applied it in a single case, they could never again apply it correctly without violating equal protection. A plaintiff, to whom the statute was subsequently correctly applied, could establish a denial of equal protection merely by proving that the statute was misapplied in a single previous incident and that there is no rational reason for the difference between this single previous misapplication and the subsequent correct application to him.

"A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored." *Snowden*, 321 U.S. at 11-12, 64 S.Ct. at 403. The re-

quirement of intentional discrimination prevents plaintiffs from boot-strapping all misapplications of state law into equal protection claims. "Probably no law contrived by man for his own governance ever has had or will be enforced uniformly and without exception. But the Constitution does not demand perfection." *Standard Oil Co. v. Boone County Bd. of Supervisors*, 562 S.W.2d 83, 84 (Ky.1978) (quoting *City of Ashland v. Heck's, Inc.*, 407 S.W.2d 421, 424 (Ky.1966)). The equal protection clause requires no more than that state decisionmakers applying a facially neutral state not intentionally discriminate.[8]

On remand, the district court should determine whether defendants purposefully discriminated against plaintiffs. "Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of' . . . its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979); *see also Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir.1982). Thus, for plaintiffs to prevail, defendants' conduct must have been deliberately based on an unjustifiable, group-based standard.[9]

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[8] Appellants have not cited, and we have been unable to discover, any cases finding an equal protection violation when plaintiff applied for and was denied a government benefit, the denial was proper under the terms of a facially neutral and otherwise valid statute which leaves little or no discretion to the decisionmaker, and plaintiff complains that someone else was granted a similar benefit contrary to the statute. We do not address the thorny issue of whether an equal protection violation can *ever* be shown under such circumstances. If it can, plaintiff must certainly prove purposeful discrimination in order to prevail.

[9] Purposeful discrimination can be shown by circumstantial evidence. For example, purposeful discrimination can be indirectly proven by a "stark" pattern of adverse impact on a particular

Accordingly, the judgment of the district court is VACATED and this case is REMANDED for further proceedings not inconsistent with this opinion.[10]

KRAVITCH, Circuit Judge concurring in part and dissenting in part:

Although I agree with the majority's conclusion that the judgment of the district court must be reversed, I do not find it necessary to remand the case for further proceedings. In instructing the district court to reconsider the bases of its judgment, the majority suggests that "for plaintiffs to prevail, defendants' conduct must have been deliberately based on an unjustifiable, group-based standard." With all due respect, I find this reference to group-based discrimination unrelated to the allegations of the complaint. The plaintiffs have not alleged that they were the victims of intentional, group-based discrimination. Instead, the equal protection claim consisted entirely of the following factual allegations:

> Without justification, defendants have allowed additional sewage from Joseph's building. Defendants have also allowed changes in numerous other building [sic] and businesses surround E & T's building, which increase the sewage going into Patton Creek Sewage Treatment Plant. Examples include the change of a Bonanza Restaurant into a larger and busines "Po-Folks" Restaurant, an addition to the "El Palacio" Restaurant, the change of a bakery to

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group. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). When deciding whether such a stark pattern exists in this case, the district court should consider particular misapplications of the moratorium, if any, in light of the hundreds of sewer applications that defendants have processed.

[10] If the district court finds no purposeful discrimination, then it should award judgment in defendants' favor. In that event, the district court need not decide whether plaintiffs were similarly situated with others who were allowed to increase their sewage.

> "Incahoots" Restaurant and Bar, the building of the "Hoover Emergency Medicine South" Clinic, and others. There is no justification for treating such buildings differently than that owned by plaintiffs.

The complaint thus does not allege that the plaintiffs were denied the additional sewage allocation because they were the members of a suspect or even a quasi-suspect group. *See, e.g., Plyer v. Doe*, 457 U.S. 202, 216-18, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982). Nor does the complaint contend that the additional sewage allotment involves a "fundamental right." *See, e.g., id.* Consequently, the complaint alleges nothing more than that, in denying plaintiffs' application for an additional sewage allocation while granting those of others, the defendants denied the plaintiffs' rights to equal protection by acting in an arbitrary manner. *See, e.g., Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971); *Logan v. Zimmerman Brusch Co.*, 455 U.S. 422, 442, 102 S.Ct. 1148, 1161, 71 L.Ed.2d 265 (1982) (Blackmun, J., concurring).

Under this type of equal protection claim, the defendants' "intent to discriminate" is essentially irrelevant. Indeed, there can be no question but that the defendants intended to treat E & T differently from the companies which received additional sewage allotments. They did not, for example, award the additional allotments on the basis of names drawn out of a hat.

To succeed on their equal protection claim the plaintiffs must demonstrate that they were treated differently as the result of action that did not "rationally advanc[e] a reasonable and identifiable governmental objective." *Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S.Ct. 1074, 1083, 67 L.Ed.2d 186 (1981); *see City of Clebourne v. Clebourne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). This rational basis, however, need not actually have been relied upon by the governmental body: it is enough if there are "plausible rea-

sons" for the actions.[1] *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980); *Fleming v. Nestor*, 363 U.S. 603, 612, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960); *cf. Clebourne Living Center*, 105 S.Ct. at 3259-60 (considering actual grounds of governmental decision in determining that special zoning requirement was was not supported by "any rational basis").[*]

In finding that plaintiffs had prevailed on their equal protection claims, the district court relied solely on the different resolutions of the sewage allotment applications of E & T and Joseph. Assuming *arguendo* that E & T and Joseph were similarly situated, it is clear from the majority opinion that there were legitimate, rational, and identifiable grounds to justify the different treatment they received. The majority does not suggest that there was no rational basis for the different classifications of E & T and Joseph under the original sewage moratorium. Certainly, "grandfather" clauses similar to those included in the original moratorium consistently have been upheld against equal protection challenges. *See, e.g., New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976) (per curiam). The dispute thus centers on whether, under the moratorium as subsequently amended, Joseph was entitled to the additional sewage

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[1] The majority characterizes the plaintiffs' claim as one involving the unequal administration of a facially neutral statute. *See* Manuscript at 1112 n. 5. Even if this characterization is accurate, it does not alter the fact that the sewage allocation to Joseph was not unconstitutional unless there is no rational basis to support the decision. The majority notes that different standards of proof are necessary in claims involving facially discriminatory statutes, facially neutral statutes resulting in a disparate impact, and unequal administration of facially neutral statutes. *See id.* However, the cases relied upon for these various standards each involved application of "strict" or "heightened" scrutiny.

[*] Thus, these cases are inapposite to the rational-basis claim asserted by plaintiffs here.

allotment that previously had been allocated under the prior moratorium scheme.

The majority's instructions to the district court make clear, however, that there were numerous rational and legitimate reasons supporting the Moratorium Board's decision to grant Joseph the additional sewage allotment despite the conditions that had been placed on the previous allocation. Whether these reasons in fact were the basis of the Board's decision are, for the purposes of the plaintiffs' equal protection claims, irrelevant. *See Fritz, supra*; *Fleming v. Nestor, supra.* Accordingly, I would reverse the judgment of the district court. Furthermore, as the appellees did not cross-appeal from the district court's order, I find no reason to remand the case for that court to consider other, possibly viable grounds to support the plaintiffs' equal protection claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-2585-S

E & T REALTY, *et al.*,
Plaintiffs,

vs.

EDWIN A. STRICKLAND, *et al.*,
Defendants.

ORDER

Upon motion of plaintiff E & T Realty, a partnership, the Court's order entered on December 31, 1985 in this cause is hereby ALTERED and AMENDED to award judgment for the plaintiff in the amount of $161,920.00.

DONE this 25th day of June, 1986.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-2585-S

E & T REALTY, an Alabama General Partnership, and CHARLES D. BEARD, JR., and individual,
Plaintiffs,

vs.

EDWIN A. STRICKLAND, RICHARD L. STRAUB, JACK W. SWANN, O. C. MOON, and ROBERT ERWIN, individually and in their capacities as members of the Jefferson County Sewer Moratorium Committee, and CHRISS H. DOSS, RAY MOORE and DAVID ORANGE, individually and in their capacities as members of the Jefferson County Commission,
Defendants.

[Filed Dec. 31, 1985]

FINAL ORDER AND INJUNCTION

Based on the accompanying Memorandum Opinion, it is hereby ORDERED, ADJUDGED, DECREED and DECLARED as follows:

1. The Defendants EDWIN A. STRICKLAND, RICHARD L. STRAUB, JACK W. SWANN, O. C. MOON, ROBERT ERWIN, CHRISS H. DOSS, RAY MOORE, and DAVID ORANGE have violated the rights of plaintiff E & T REALTY, a partnership, to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

2. The defendants EDWIN A. STRICKLAND, RICHARD L. STRAUB, JACK W. SWANN, O. C. MOON,

ROBERT ERWIN, CHRISS H. DOSS, RAY MOORE, and DAVID ORANGE, their officers, agents, servants, and employees, and those persons in active concert or participation with them ARE PERMANENTLY ENJOINED from failing to grant to plaintiff E & T REALTY, a partnership, its successors and assigns, a sewer allocation of at least 1,000 gallons per day and authorization to relocate existing plumbing fixtures in the building located at 1945 Hoover Court, Hoover (Jefferson County, Alabama.

3. As the prevailing party in this action, E & T REALTY, a partnership, is entitled to a reasonable attorney's fee, to be hereafter set by the Court upon motion of the plaintiff if the parties are unable to reach agreement within 45 days after the date of this order.

4. The costs of this action are hereby taxed against defendants, for which execution shall issue.

DONE this 31st day of December, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-2585-S

E & T REALTY, an Alabama General Partnership, and CHARLES D. BEARD, JR., and individual,
Plaintiffs,

vs.

EDWIN A. STRICKLAND, RICHARD L. STRAUB, JACK W. SWANN, O. C. MOON, and ROBERT ERWIN, individually and in their capacities as members of the Jefferson County Sewer Moratorium Committee, and CHRISS H. DOSS, RAY MOORE and DAVID ORANGE, individually and in their capacities as members of the Jefferson County Commission,
Defendants.

MEMORANDUM OPINION

In this action under 42 U.S.C. § 1983, plaintiffs E&T Realty, an Alabama partnership and Charles D. Beard, its managing partner, complain that the defendants Chriss H. Doss, Ray Moore, and David Orange, county commissioners of Jefferson County, Alabama, have denied them the equal protection of the laws and deprived them of their property without just compensation. The complaint emanates from the failure of the Jefferson County Sewer Moratorium Committee (composed of defendants Edwin A. Strickland, Richard L. Straub, Jack W. Swann, O. C. Moon, and Robert Erwin) to grant to E & T Realty an exemption from the county sewer moratorium.

For the reasons which follow, the Court finds and concludes that the defendant commissioners have indeed violated the plaintiffs' right to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution.

Since the early seventies, sewer facilities in the southern part of Jefferson County, Alabama have been grossly inadequate to serve the substantial residential and commercial demands. Recognizing the gravity of the problem, the County Commission declared a sewer connection moratorium effective February 10, 1976. The Commission provided for three exemptions to the moratorium.

In December, 1976, the Commission by resolution provided that the moratorium would terminate as of July 1, 1978.

On September 27, 1977, the Commission abolished the earlier exemptions and substituted therefor the following:

> . . . there shall be excluded from this moratorium any sewer connections authorized by valid building permits issued prior to the date hereof by valid building permits issued by the Cities of Mountain Brook, Alabama; Hoover, Alabama; and Vestavia Hills, Alabama, which have been approved by Jefferson County and which permits are valid on the date hereof. Also excluded from the moratorium are sewer connections for proposed construction which has received approval by the Jefferson County sewer moratorium committee prior to the date hereof but has not yet been permitted. . . .

In June, 1978, the moratorium was extended to July 1, 1980.

In response to the dissenting opinion in *Custred v. Jefferson County*, 360 So.2d 285 (1978) the Commission enacted the following resolution on July 15, 1978:

IT IS HEREBY DECLARED THAT:

(a) Connections, reconnections, expansions and changed uses of properties connected to the systems are subject to the moratorium;

(b) The foregoing applies to properties connected to either system prior to the inception of the moratorium and to those properties authorized to connect to either system subsequent to the moratorium;

(c) Only such connections, reconnections, expansions, and changed uses of properties connected to said systems (before or after the moratorium) are or will be authorized as will not impact the sewer systems greater than the impact from such properties in the most recent former use of such properties.

The resolution noted that ". . . the Commission, in subsequent resolutions, has removed all . . . exceptions to the moratorium for connections not already permitted except where instructed by the Health Department to the contrary."

The Commission has not amended the moratorium resolutions since 1983, when the Commission ratified all prior actions of the Sewer Moratorium Committee and amended the earlier resolutions to provide that

> . . . the sewer connection moratoriums on the Patton Creek Wastewater Treatment Plant and the Cahaba River Wastewater Treatment Plant are hereby extended to July 1, 1985, provided, however, said moratoriums shall be subject to continuous review and that should sufficient sewage treatment capacity become available at any time on either of said sewage systems to reasonably justify a relaxation of either moratorium in whole or in part, such

moratorium may be so terminated or modified to allow additional sewer connections.

The sewer moratorium is administered by the Jefferson County Moratorium Committee, which apparently was established by the Jefferson County Commissioner of Public Works. It consists of the county attorney (defendant Edwin A. Strickland), the county engineer (defendant Richard L. Straub), the county's sanitary engineer (defendant Robert Erwin), the assistant sanitary engineer (defendant Jack W. Swann), and defendant O. C. Moon.

The Moratorium Committee reviews applications for sewer connection permits, and determines whether the applications are subject to the moratorium, and if so, whether the application should be approved under one of the exceptions to the moratorium. An applicant who is dissatisfied with the decision of the Moratorium Committee may appeal to the Commissioner of Public Works and the entire Commission.

The Moratorium Committee is very informal. Regular meetings are not held; minutes of meetings are not kept in the ordinary course of business. Application forms have not been adopted by the Committee. Other than the moratorium resolutions and amendments thereto, there are no written rules, regulations, or uniform criteria which have been adopted by the Moratorium Committee. Nonetheless, the Alabama Supreme Court has held that the Committee is the proper administrative body charged with the interpretation and enforcement of the moratorium rsolutions. *Custred, supra,* at 289; *Peterson v. Jefferson County,* 372 So.2d 839 (1979).

In determining whether a proposed connection, reconnection, expansion, or changed use "of property covered by the moratorium will have an impact on the sewer system, the Moratorium Committee generally relies on

water consumption records of the Birmingham Water Works Board.

Plaintiff E & T Realty is an Alabama general partnership, which in February of 1980 purchased a three-story building located at 1945 Hoover Court, ("the Macmillan Building") in the City of Hoover (Jefferson County), Alabama. When it purchased the building, E & T was aware of the sewer moratorium. The building contains 70,000 square feet of space, most of which had been unoccupied in the five years preceding the purchase.

Based on the available records from the Water Works Board, an average of 448 gallons of water per day ("gpd") was consumed by the Macmillan Building between 1967 and 1980. In the period of maximum utilization of the building, 1967-1975, an average of 607 gpd was consumed. In the most recent period, 1980-83, an average of 395 gpd was consumed by the building.

In *Peterson, supra,* the Moratorium Committee took the position that ". . . the moratorium contemplates a right in the property owner for continued use of its ordinary sewage use, "even where the property has been vacant." *Id.* at 483.[1]

Defendant Swann, prior to the 1980 sale of the Macmillan Building, informed its owner that sewer allocations would be based on the three years of highest water consumption.

In the early part of the summer of 1983, Lloyd Noland Hospital offered to lease 3,000 square feet of the Macmillan Building, for use as a medical clinic, and to pay E & T Realty approximately $2,200 per month for three

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[1] In *Peterson,* the Moratorium Committee "concluded it would be reasonable and proper to strike those quarters from the calculation" which were out of line either because of extraordinarily high water consumption attributable to a leak or unusually low due to a phase out of the business of the last occupant." 483, 484.

years, commencing in July, 1983. It also agreed to make improvements to the building in the approximate amount of $100,000.00. The operation of the Lloyd Noland Clinic would require a 440 gpd sewer allocation.

On August 10, 1983, E & T Realty formally applied to the Moratorium Committee for a sewer allocation of 5,300 gpd. The requested allocation was based on the reconstructed water usage of the building in prior years as reflected in the affidavit of the previous owner of the building, and the projected needs of the building in the future. A few weeks later, E & T Realty modified its application to alternatively request a relocation of existing fixtures in the Macmillan Building. The Moratorium Committee, and subsequently the defendant Commissioners, denied the application. The denial was based on the ground that the requested changes would result in additional sewage flowing into the Patton Creek Wastewater Treatment Plant.

Following the denial of the E & T Realty application for additional sewer allocation, Lloyd Noland Hospital contracted with Mitchell Joseph for the placement of the clinic on the Joseph property. The clinic was ultimately located on the Joseph property several blocks from the Macmillan Building.

In 1977, Mitchell Joseph applied to the Moratorium Committee for approval of a 5,130 gpd sewer allocation. On September 7, 1977, the Committee advised Joseph that his request qualified as an exception to the sewer moratorium. The request was approved, subject to the condition, among other things, that "[t]his approval shall automatically terminate and no connection will be allowed unless substantial construction is begun in accordance with the proposed plans within 180 days of the date of this letter." The letter specifically stated that the phrase " 'substantial construction' shall mean that, at a minimum, the sanitary sewer construction shall have been completed and con-

struction of 50% of the proposed buildings are above ground level."

There were three proposed buildings: a bank and office building, a fast food restaurant, and a motel.

Although building permits were obtained and the sanitary sewer construction was completed within the succeeding six months, it is manifestly clear that "construction of 50% of the proposed buildings" was not accomplished by February 7, 1978. In fact, some eighteen months later, construction had not commenced on the second and third buildings.

As of mid-February, 1978, the Moratorium Committee's approval for the 5,130 gpd sewer allocation for the Joseph property had "automatically terminated," by its own terms.

Over a year after the automatic termination of the allocation, Mitchell Joseph wrote to the Moratorium Committee and requested permission to build six retail shops instead of the proposed motel. Proceeding as if the previously terminated allocation were still effective, the Moratorium Committee granted the request. This action of the Moratorium Committee was subsequently ratified by the Jefferson County Commission.

There has been no showing of any difference in the relative positions of Mitchell Joseph in 1979 and E & T Realty in 1983. The defendants have not shown any rational basis for the granting of the 5,130 gpd allocation to Mitchell Joseph and the denial of a 1,000 gpd allocation to E & T Realty. For example, it has not been established that between 1979 and 1983, the volume of sewage flowing into the Patton Wastewater Treatment Plant substantially increased.

The Court concludes that the difference in the defendants' treatment of E & T Realty and Mitchell Joseph is irrational, arbitrary, and capricious.

If E & T Realty's request had been properly acted on by the defendants, it would have leased 3,800 square feet of space to Lloyd Noland Hospital for 36 months at $2,200 per month, commencing in September, 1985; and the improvements to the property under this lease would have approximated $100,000.00. In September, 1984, E & T Realty was able to rent the 3,800 square feet of property to other tenants at $8,640.00 per month—a rate substantially in excess of the amount to which it would have been entitled under the proposed lease with Lloyd Noland Hospital. Under these circumstances, E & T Realty is not entitled to an award of monetary damages, other than attorneys' fees.

By separate order, the defendants shall be enjoined from failing to grant E & T Realty's application for a 1,000 gpd sewer allocation and to relocate existing plumbing fixtures within the Macmillan Building.

DONE this 31st day of December, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge